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81-2087

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

MICHAEL J. CONWAY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether *Rawlings v. Kentucky*, 448 U.S. 98 (1980) requires that a defendant have exclusive physical possession of a container in order to reasonably expect privacy in the container;

2. Whether statements made by the defendant were produced by and the fruit of the same statements made by him a few minutes earlier or whether the taint was attenuated;

3. Whether police may continue interrogation after a defendant's assertion of the right to remain silent and if so, what showing is required to establish a waiver by the defendant.

TABLE OF CONTENTS

	Page
Questions presented	i
Opinions below	1
Jurisdiction	2
Statement of facts	3
Reasons for granting the petition	7
Conclusion	15

TABLE OF AUTHORITIES CITED

Cases

	Page
Brown v. Illinois, 422 U.S. 590 (1975)	11
Dunaway v. New York, 442 U.S. 200 (1979)	11
Edwards v. Arizona, 451 U.S. 477, rehearing denied 452 U.S. 973 (1981)	12
Jones v. United States, 362 U.S. 257 (1960)	10
Mancusi v. De Forte, 392 U.S. 364 (1978)	10
Rakas v. Illinois, 439 U.S. 128, 136 (1978)	10
Rawlings v. Kentucky, 448 U.S. 98 (1980)	i, 1, 7, 8, 9, 10
Reid v. Georgia, 448 U.S. 438 (1980)	15
United States v. Jeffers, 342 U.S. 48 (1951)	10
United States v. Salvucci, 448 U.S. 83 (1980)	1

Constitution

United States Constitution:	
Fourth Amendment	8, 9, 15
Fifth Amendment	12, 15

Statutes

21 U.S.C. Section 846	2
28 U.S.C. Section 1254	2

Other Authority

Devitt and Blackmer, Fed. Jury Instructions, § 12.05, § 27.05 ¶ 2	14

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Michael C. Conway petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Petitioner was arrested on March 1, 1978. Prior to trial Petitioner moved to suppress evidence. His motion was granted. The Government appealed arguing that Petitioner lacked standing to move to suppress, and the Ninth Circuit affirmed the suppression order (Opinion attached as Exhibit A). This Court then reversed and remanded to the Ninth Circuit for reconsideration in the light of *Rawlings v. Kentucky*, 448 U.S. 98 (1980) and *United States v. Salvucci*, 448 U.S. 83 (1980) (Order attached as Exhibit B). The Ninth Circuit reconsidered and then ordered the case remanded to the District Court for further proceedings on

the motion to suppress (Exhibit C attached). The District Court then denied Petitioner's suppression motion on the grounds that he had no reasonable expectation of privacy in his suitcase and the evidence was thus admitted against Petitioner (Exhibit D attached). Petitioner appealed, and the Ninth Circuit affirmed (Exhibit E attached). A Petition for Rehearing and Motion to Stay Mandate were denied (Exhibits F and G attached).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATEMENT OF FACTS

Petitioner was convicted on March 2, 1981, of one count of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846 and sentenced to prison for five years. Petitioner was released on a $50,000 property bond pending his appeal and was incarcerated subsequent to the court of appeals decision herein.

Petitioner and his co-defendant Carlo Mazzelli attended college together at the University of New Mexico and had been friends for 12 or 13 years. Conway is a lawyer and Mazzelli is employed as a park maintenance worker (R.T. III: 26, 31).[1] Conway lived in San Diego and Mazzelli lived in Oakland (R.T. III 6; 25; 45; 63-64; E.R., 53).[2] On Feb-

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[1]"R.T." refers to the reporter's transcript. R.T. I is the transcript of May 11, 1978; R.T. II is 5/15/78; R.T. III is 12/22/80; R.T. IV is 12/19/80, and R.T. V is 2/20/81.

[2]"E.R. refers to the Excerpt of Record prepared in the Ninth Circuit.

ruary 22 and 23, 1978, Petitioner Conway went to Florida to purchase a quantity of cocaine (R.T. III 5; E.R. 205). Conway was successful in acquiring the cocaine *(id)*. Conway and Mazzelli had agreed that they would meet in Florida and Mazzelli would weigh and test the contraband and assist Conway in carrying it to the San Francisco area (R.T. III 15; 30-33).

Conway paid for Mazzelli's plane tickets and agreed additionally to pay Mazzelli a sum of money for his role in helping Conway (*id.*; R.T. III 41).

Petitioner Conway met Mazzelli in Miami and they stayed together in the same room of the Howard Johnson's motel (R.T. II 22; E.R. 231). Mazzelli stayed only one night and the following day they went to a boat show together and prepared to leave Miami for San Francisco (R.T. I 30).

Prior to leaving Miami, Conway purchased an American Tourister suitcase with a combination lock. Conway disclosed the name and address of the store where he bought the suitcase and the date of purchase in the court below (R.T. III 6-7; E.R. 176). Conway had also purchased the Halliburton Briefcase which contained the contraband (R.T. III 8). Conway himself had placed the contraband inside the briefcase, placed the briefcase inside the suitcase, set the combinations on both containers and locked them. Conway testified to the correct combinations in the District Court (R.T. III 6-14; 66). Along with the contraband, Conway placed some of his clothing and personal effects inside the suitcase (R.T. III 9, 68-72; E.R. 178).

Conway's testimony in relation to the foregoing was corroborated by the fact that his fingerprints and his

fingerprints alone were found on the plastic packaging enclosing the cocaine. No other fingerprints were identified on that paper although the examiner looked specifically for Mazzelli's prints (E.R. 173-174).

Conway and Mazzelli left the hotel where they had stayed together in Miami and travelled together to the Miami airport by automobile (R.T. III 11, 15). Conway placed the locked American Tourister containing the narcotics into the trunk of the vehicle. At the Miami airport, Mazzelli carried that suitcase into the terminal and eventually checked it in for the flight to San Francisco (R.T. III 19-20, 33-34).

Conway entered the airport terminal a little before Mazzelli (R.T. III 17-18). The plane's departure was late and both Conway and Mazzelli waited in the terminal area (R.T. II 43-44). Although Conway and Mazzelli did not speak to each other, they appeared to Miami police to know and be associated with each other (E.R. 75-77). They ere seated near each other and "looked at each other several times" *(id.)*. Both appeared nervous and both were questioned by Miami police prior to the flight.

Conway and Mazzelli together boarded the same plane bound for San Francisco (R.T. III 17-18). They sat together on the airplane (R.T. III 16). In San Francisco, they deplaned and went to the baggage claims area where they spoke to each other and Conway handed Mazzelli the claim ticket for the American Tourister suitcase. Mazzelli claimed the suitcase, Conway claimed an additional suitcase, and they started to leave the terminal. Drug Enforcement Agents stopped both of them prior to their departure.

Agent Ruzzamenti approached Petitioner. Ruzzamenti had determined to question Conway before approaching him and Conway was not free to go until the agents accomplished their purpose of interrogating him (R.T. II 51; R.T. III 48). Agent Ruzzamenti identified himself, showing DEA credentials. He asked Mr. Conway "if he would be willing to speak with us" (R.T. II 18). Conway agreed (R.T. III 47-48). Ruzzamenti asked if Mr. Conway had any identification and Conway said that he did, producing a California driver's license *(id.)*. Agent Ruzzamenti then told Mr. Conway that he was conducting a narcotics investigation, that he suspected Conway "and that we'd like to speak with him" (R.T. II 18). Conway refused to talk further with the agents and stated that he wished to leave. The agents, however, persisted in questioning him. They again told him that "we'd like to talk to him", that they had information to the effect that he was involved in illegal activity in Miami, that they wanted to ask him questions "relative to his conversations in Dade County" (R.T. II 18, 48; RT III 48) and that they wanted him to accompany them. Conway flatly refused to answer questions or leave the area with the agents (R.T. III 22-23). He stated that "the only way he would talk to us is if he was under arrest" (R.T. II 19, 48-49). The agents persisted and Conway accused them of "Gestapo activities" and "Nazi tactics", asking onlookers to stop and witness this illegal arrest (R.T. III 63).

Agent Young "may have grabbed [Conway's] arm" (R.T. II 50-51; R.T. III 23). In the words of Agent Ruzzamenti, "we told him he was going to come with us upstairs" (R.T. II 49). He was taken up two flights of stairs in the terminal

building to a "storage area . . . just an empty room type thing" (R.T. II 20). Conway was seated in this empty room, given *Miranda* warnings and interrogated for about 30 minutes (R.T. II 21; R.T. III 50).

Once the agents forced Conway upstairs and got him alone inside the storage room, "he stopped yelling and he was very calm and spoke to us and answered our questions" (R.T. II 22). Ruzzamenti asked Conway if he knew Mazzelli, and Conway denied knowing or ever having known him *(id.)*. Ruzzamenti asked why Conway had met with Mazzelli in the terminal area and passed him a rolled up piece of paper. Conway said he'd only told an individual that he liked his suit *(id.)*. Ruzzamenti asked Conway a series of questions as to where he worked, where he had stayed in Miami, what he had told the Miami officers and other topics. Conway answered those questions by Ruzzamenti and others by Agent Young who was also in the room during this interrogation (R.T. II 21-23).

Meanwhile, other agents had seized the suitcase carried by Mazzelli and had pried it open and discovered cocaine. This search was conceded by the Government to be without consent, probable cause, or a warrant (R.T. II 48-51, 82-83, 106-107, 117-120; R.T. III 24-25). At about 11:40 one of these agents advised Ruzzamenti who in turn advised Conway of the discovery of cocaine and of the fact Mazzelli was under arrest. Conway responded, "You'll be arresting me for conspiracy, then?" (R.T. II 23). Ruzzamenti replied, "Yes, we would be arresting him for his involvement . . ." *(id.)*. Conway was formally arrested, advised of his *Miranda* rights, and the questioning continued. Conway

told the same story he had told before. Specifically, Conway persisted in denying that he knew Mazzelli (R.T. III 63). These statements were used in evidence against Conway at his trial (E.R. 227). Since Conway's fingerprint was on the wrapping paper containing the cocaine, his denial of knowing Mazzelli and his statement about being arrested for conspiracy showed a consciousness of guilt which foreclosed any serious argument that he was a mere innocent travelling companion who inadvertently touched the wrapper.

REASONS FOR GRANTING THE PETITION

1. The decision of the court of appeals reads *Rawlings v. Kentucky*, 448 U.S. 98 (1980) as holding that unless a defendant is in exclusive physical possession of a container, he relinquishes all privacy interests and may make no claim for its illegal search. While such a holding may appear superficially to be consistent with the facts of *Rawlings*, certiorari should be granted to resolve that it is not consistent with the reasoning of *Rawlings* or the holdings in prior cases decided by this Court.

Rawlings sets forth significant criteria by which to evaluate a claimed expectation of privacy in a container which has been searched: ownership of the container, prior use, control at the time of search, the right to exclude others from the container and precautions taken to protect the privacy of the container. These were the considerations in *Rawlings v. Kentucky*, and they formed guidelines for decision of the case. A petition should be granted in the instant case to demonstrate that the criteria set forth in

Rawlings was significant and were intended to be applied by the lower courts to future fact situations.

When these criteria are applied to the facts in *Rawlings* and to the facts of the instant case, the error in the Court of Appeals' application of *Rawlings* becomes clear, as shown by the following.

Petitioner Rawlings had "dumped" drugs into the purse of a bare acquaintance only moments before a police search began. Rawlings' claim to a fourth amendment interest rested solely on his presence and placement of the contraband contents inside the purse. This Court held that was insufficient. Rawlings was not the owner of the purse, he'd never used the purse before this, and the Court doubted whether the owner of the purse even consented to his use of the purse on the instant occasion. Rawlings neither claimed nor had any control over the purse. He had no right to exclude anyone from the purse, and he had taken no precautions to protect the privacy of the purse. Finally, Rawlings testified that he had no expectation of privacy in the purse.

The instant case departs from *Rawlings* with reference to each of these criteria expressly relied upon to evaluate an expectation of privacy in that case. Petitioner Conway was the owner of the suitcase which was searched. He'd purchased it and he'd packed it and he was physically present at the time of the search for the express purpose of excluding other persons from access to it. Petitioner Conway had locked the suitcase with a combination lock, thus taking ample precautions to protect its privacy. Conway testified, and the District Court acknowledged, that he

possessed an expectation of privacy in the suitcase and that the reason he accompanied the suitcase on this airplane trip was to protect that expectation of privacy. Thus, it is clear that the criteria used in *Rawlings* to evaluate an expectation of privacy in a container possessed physically by another person point irrefutably to the existence of such an interest in the case at bar. *Rawlings* should stand strongly for the Fourth Amendment rights of Petitioner Conway.

The Ninth Circuit Memorandum Decision holds essentially that because Petitioner's travelling companion Mazzelli physically carried the suitcase prior to its search, Petitioner Conway lacked a reasonable expectation of privacy in it, regardless of the presence or absence of *Rawlings'* criterion. The Court reduces *Rawlings* to the sole principle that a person must have exclusive physical possession of a container in order to assert any expectation of privacy in that container. Thus, only if Conway had his suitcase clutched in his hand when the agents seized it would the law recognize his privacy interests. If Conway let go of the suitcase or distanced himself a few feet from it, he should expect that it may be seized, have its locks broken and contents exposed.

In so holding, the Ninth Circuit's Decision is in conflict with several prior decisions of this Court which recognize a Fourth Amendment interest in persons who are not in exclusive physical possession of an area or container at the time of its search but who instead share its use with another person or persons.

Thus, in *Jones v. United States*, 362 U.S. 257 (1960), Appellant had permission to use someone else's apartment and shared use with them. In *United States v. Jeffers*, 342 U.S. 48 (1951), respondent shared use of a hotel room with his two aunts and was not present at the time of the search of the room. In *Mancusi v. De Forte*, 392 U.S. 364 (1978), respondent shared a union office and a desk within it with other union members. The area was not "reserved for his exclusive personal use" (*id.* at 368-69). In all these cases the evidence was suppressed and the court specifically affirmed that exclusive personal use or physical possession is not required to establish a protected Fourth Amendment interest. Where the use and possession of a container or premises is shared with another person who could reasonably be expected to protect a shared privacy, this Court has consistently recognized a fourth amendment interest.

The continued vitality of these precedents was recently asserted by this Court in *Rakas v. Illinois*, 439 U.S. 128, 136, 139 (1978). Nevertheless, the Court of Appeals' decision in the instant case effectively rejects these precedents, and significantly misconstrues the decision in *Rawlings v. Kentucky, supra,* holding that because Petitioner did not carry his suitcase, he "relinquished" his expectation of privacy in it.

2. Admission in evidence of Petitioner's statements violated the Fourth Amendment because they were the fruit of an illegal arrest.

Petitioner's arrest and transportation from the airport baggage claim area to the interrogation room was con-

ceded by the Government and the lower courts to be without probable cause and unlawful. Similarly, the Government conceded that statements made during the illegal arrest were tainted and could not be admitted in evidence (E.R. 216-217).

However, the Government argued and the District Court agreed that a line should be drawn in the interrogation at the point where cocaine was discovered. The court held that was an "intervening event" which attenuated the taint of the illegal arrest. Thus, the Government could not offer in evidence statements made prior to the discovery of the cocaine, as these were illegally obtained, but was allowed to admit in evidence precisely the same statements repeated after the discovery of the cocaine (R.T. V).

The Petition should be granted to articulate and clarify the nature of the causal connection between an illegal detention and subsequent statements required for suppression by *Brown v. Illinois*, 422 U.S. 590 (1975) and *Dunaway v. New York*, 442 U.S. 200 (1979).

In both *Brown* and *Dunaway* the petitioners made two separate statements. In both cases this Court briefly disposed of the argument that intervening circumstances attenuated the taint of the second statement saying that "the second statement was clearly the result and fruit of the first", *Brown v. Illinois, supra* at 605; *Dunaway v. New York, supra* at 204 n.2.

Petitioner's presence in the interrogation room and his reversal of his initial decision not to speak to the agents were clearly products of his illegal arrest. His further answers, repeating essentially the same information given

previously, are inseparable from the illegal statements and should be held to be the fruits of those statements. The notion that the discovery of cocaine is an intervening event which attenuates the taint should be rejected for the reason that the discovery of the cocaine had no causal connection with the making of the statements. On the contrary, the statements were first made *before* the discovery of the cocaine and were simply repeated afterwards.

3. Admission in evidence of Petitioner's statements violated the Fifth Amendment because he had repeatedly and insistently asserted his refusal to talk to the agents, and they persisted in interrogating him. The agents forcibly removed Petitioner to a small empty interrogation room where they repeated *Miranda* warnings and commenced interrogation. This questioning came immediately after Petitioner's repeated refusal to be questioned, was accompanied by a show of physical force and succeeded in obtaining responses from Petitioner.

In *Edwards v. Arizona*, 451 U.S. 477, *rehearing denied* 452 U.S. 973 (1981), this Court held that once an accused invokes his right to counsel, a valid waiver of that right is not established by showing only a further advise of *Miranda* rights and responses to police initiated interrogation.

The case at bar is markedly similar to *Edwards*, except that Petitioner Conway asserted his right to remain silent rather than his right to counsel. The instant case thus presents the question of whether and to what extent the standards set forth in *Edwards* apply to the assertion of *Miranda* rights other than the right to counsel. The Peti-

tion should be granted in order to clarify whether once a defendant has asserted his right to remain silent and refused requests that he submit to interrogation, the police may force him into an interrogation room, repeat *Miranda* warnings, continue questioning him and validly claim a waiver based on the fact that the defendant answers the questions at that point.

4. Admission in evidence of Petitioner's denial that he knew Mazzelli was not harmless beyond a reasonable doubt.

Petitioner was tried on stipulated facts (E.R. 220-228). The evidence contained in those facts is exclusively circumstantial.[3] Foremost among this evidence was the presence of Conway's fingerprints on the opaque wrapping paper which contained the cocaine (E.R. 228, 232). The Government, beyond showing these fingerprints, would have to establish, at least by inference, that they got on the paper in a manner inconsistent with innocence. Conway had legitimate access to Mazzelli's property because they stayed together in Miami and travelled together in San Francisco. He could have touched this paper at any time before it contained the cocaine or even afterwards without knowing what it contained. Unlike a burglar who leaves his prints in the home of another, Conway had various opportunities to legitimately and innocently touch this paper and so the fingerprints alone do not establish guilt beyond a reasonable doubt.

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[3]The statement of facts in this Petition includes primarily facts testified to by Petitioner on pre-trial motions which were *not* admitted in evidence at his trial.

Clearly the critical factor aside from the prints was Conway's denial that he knew Mazzelli or had ever met him. He persisted in this denial when questioned closely (E.R. 227; R.T. II 22). This denial was false, as shown by the fingerprints themselves, as well as the hotel registration information. This false denial established Conway's consciousness of guilt. It pointed inevitably to his knowledge of the unlawful plan and his willful participation in it. The statements were the facts which separated Conway from an innocent travelling companion whose mere presence could not establish guilt (Devitt and Blackmer, Fed. Jury Instructions, § 12.05, § 27.05 ¶ 2). No other evidence possessed the persuasive power of these false statements in establishing knowing participation. Clearly admission of the statements was not harmless beyond a reasonable doubt.

The Circuit Court states that "other properly admitted evidence" demonstrated Petitioner's guilty knowledge so strongly that his incriminating statements were harmless beyond a reasonable doubt. The court points to "evidence" that was "admitted" that Conway was "a suspected cocaine dealer". However, there was no such evidence admitted anywhere at Petitioner's trial and the Circuit Court is simply mistaken (see Stipulation of Fact at E.R. 220-229).

The court also relies on the allegation that Petitioner and Mazzelli gave false accounts of their stay in Miami when questioned by police. Again, the court is mistaken and one scrutinizes the stipulated facts for trial in vain to find any evidence that the answers given by both Petitioner and Mazzelli were false. On the contrary, the evi-

dence showed Petitioner presented valid identification and gave his actual phone number, residence, and business addresses (E.R. 220-229).

The court states that Petitioner and Mazzelli "acted suspiciously", an apparent reference to hurried, nervous behavior described by the agents. Virtually identical behavior was recently held by this Court to fall short even of "founded suspicion" for a detention. *Reid v. Georgia*, 448 U.S. 438 (1980).

Petitioner's statements were clearly the most significant evidence aside from the prints, and their admission was not harmless. Thus, the significant Fifth and Fourth Amendment issues raised by admission of these statements are proper questions for consideration by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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(Appendices follow)